BRIEF SUPPORTING APPLICATION

MAY IT PLEASE THE COURT:

We respectfully submit that it seems to us clear beyond question that the Court of Appeals has failed to follow the jurisprudence laid down by the Supreme Court of Louisiana, on important questions of local law, as follows:

1. GASOLINE

As previously stated, before the gas taken from the well on petitioner's land was sold, the gasoline content was extracted and sold separately.

It seems the height of injustice for the Court to hold, as does the Court of Appeals, that a landowner is entitled to nothing whatever for this gasoline taken from his land. It would be more reasonable to hold that the gas company, lessee, is not entitled to any part of the gasoline, and the landowner is entitled to all of it, because the landowner had not permitted the lessee to take it.

This issue has been before the Supreme Court of Louisiana twice recently.

In *Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737, 739,* that Court said:

> "We find nothing in the record to warrant the belief that the lease under review contemplated that defendant should be allowed to take the gasoline, a product of much greater value than the gas, from the leased premises, by merely paying him for one-eighth of the gas. If its gasoline content is not regarded as included in the

gas within the meaning of the contract, then, obviously, defendant is not entitled to it, or any part of it. If it is so regarded, then one-eighth of it is due plaintiff by virtue of the agreement." (Lease).

In *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561*, the lease sued on was identical with the one in the case at bar, as to gas royalty, and the landowner made the claim that since the lease he had signed made no mention of gasoline, and he owned everything on his land except what he had sold, that the gas company was not entitled to any of it, that is, the landowner was entitled to *all* of the gasoline, instead of *none* as here held by the Court of Appeals. On this, the Supreme Court of Louisiana said (152 So. 565):

> "We find no merit in the contention that the lessees were entitled to none of the gasoline extracted from the natural gas. According to the expert testimony introduced in this case, practically all natural gas contains some gasoline which comes to the surface in the form of vapor. The presence of the gasoline in the natural gas, they say, is probably due to the fact that at some remote period, the gas came in contact with oil from which it took up some of the lighter fractions. Gasoline is therefore one of the constituent elements of 'natural gas' as that term is ordinarily used and understood. Act No. 252 of 1924 is an act to conserve the 'natural gas' resources of the state, and in section 13 thereof, it is stated that 'gas' means natural gas as it is taken from the earth, including any gasoline content it may have."
>
> "This court, in Coyle v. Gas & Fuel Co., supra, stated, in fact held, that 'the gasoline was part of the gas produced.' It has been so held by

the courts of Oklahoma and Texas. See Humble Oil & Refining Co. v. Poe (Tex. Com. App.) 29 S. W. (2d) 1019; Lone Star Gas Co. v. Stine et al. (Tex. Com. App.) 41 S. W. (2d) 48, 82 A. L. R. 1299.

"The lessee owned seven-eighths of the natural gas produced under the lease, which included all the constituent elements thereof, all that the gas contained."

Thus the jurisprudence of the Supreme Court of Louisiana is clear, and logical. That Court holds that when the parties to the lease at bar signed the lease stipulating royalty on natural gas, they intended to include and did include all the constituents of the gas, including the gasoline content; and when the lessee divides the gas as it comes from the well, into gasoline and "dry gas", and sells each separately, as in the case at bar, the landowner is entitled to his ⅛th of the market price of each, the gasoline and the dry gas, and the lessee to 7/8.

This is the only issue on which the Court of Appeals gave us an opinion. On this issue they wrote no opinion in the case at bar, but did refer to the case of *Union Producing Co. v. Pardue, 117 Fed. (2d) 225, 229*, in which they said:

"Here cross appellant in support of his claim relies on the statutory definition of natural gas, in Louisiana Act 252 of 1924, Section 13, (Dart Sec. 4783): 'Gas, means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casing-head gas,' and on Coyle v. Louisiana, etc., Co., 175 La. 990, 144 So. 737, and Wall v. United Gas, etc., Co., 178 La. 908, 152 So. 561. We might dispose of the cross action by a mere reference to our

holding in the Arkansas Natural Gas Corp. v. Sartor, 5 Cir., 98 F. 2d 527, that the contract did not entitle plaintiffs to royalties based on the value of the gasoline extracted from the gas. But, in view of cross appellants' insistence that the matter is ruled otherwise in Louisiana, in the Coyle and Wall cases, we will point out that this is not so and why.

The statute cross appellant invokes makes against, not for, his position. It expressly declares that the term gas means natural gas as it is taken from the earth including any gasoline content it may have, and leaves no question but that the sale of gas carries to the purchaser all, not part of its content. Cf. the Coyle and Wall cases, supra, and Humble Oil & Refining Company v. Poe. Tex. Com. App., 29 S. W. 2d 1019; Lone Star Gas Co. v. Stine, Tex. Com. App., 41 S. W. 2d 48, 82 A. L. R. 1299; Wilkins v. Nelson, 155 La. 807, 99 So. 607. It is true that in the original opinion in the Coyle case (175 La. 990, 144 So. 739), the court said, 'We find nothing in the record to warrant the belief that the lease under review contemplated that defendant should be allowed to take the gasoline, a product of much greater value than the gas, from the leased premises by merely paying him for the eighth of the gas. If its gasoline content is not regarded as included in the gas within the meaning of the contract, then obviously defendant is not entitled to it, or any part of it. If it is so regarded, then one-eighth of it is due plaintiff by virtue of the agreement.

"Aside from the fact however that no issue was made of this point in the case, it being conceded that under the lease contract plaintiff was entitled to ⅛ of the gasoline and the suit being only with regard to whether plaintiff could get this ⅛ of the gasoline without paying any part

of the cost of its extraction, the conditions in the field involved and the terms of the lease were entirely different from those here. There, the gas was so rich in gasoline with one and a half to two gallons per 1,000 feet, that it was worthless unless the gas was first extracted. This was recognized by both parties, and the lessee from the beginning accounted to plaintiff for ⅛ of the gasoline. But more important the lease there was not as here, one in which the lessor sold the gas to lessee at the well. There was no provision in that lease for sale of the gas. There, the provision was that the lessee would 'pay the lessor one-eighth royalty for the gas from each well where gas only is found, while the same is being used off the premises." Under such a provision, it was the duty of the lessee, absent an agreement for its purchase, to deliver to the lessor in kind, gas, gasoline, or whatever was made from the gas issuing from the well, or to account to him for his ⅛ of the proceeds of all sales. Here, the title to the gas passes to lessee at the well, lessee being obligated to pay lessor the value of it there. In the opinion on rehearing in the Coyle case, the true issue in the case was made clear. The court saying: 'The true issue * * * is whether plaintiff, as lessor, is entitled to be paid his proportionate part of the net sale price, or of the gross sale price, of the gasoline extracted from the gas, due him as royalty, produced from gas wells on the lease,' held that as owner of the gasoline, lessor must pay his share of the expenses, and must be settled with on the net sale price after expenses paid. In Wall's case, the lease provided as the lease here does, that the grantor should be paid the ⅛ of the value of the gas calculated at the market price, but the conditions in the field as to the strong impregnation with gasoline were the same as those in the Coyle case, and as in that case, the

lessee from the beginning had recognized the right of the lessor to an interest in the gasoline. There the lessor contended not for ⅛ but for all of the gasoline and when the case reached the Supreme Court, two main questions and one secondary one were raised, posed and decided there. First, as to what was the meaning of the terms 'market prices' as used in the lease, second, whether the lessor under the lease providing for a ⅛ royalty interest 'is entitled to all the gasoline extracted from the gas or only ⅛ of it,' and third, the question decided in the Coyle case, whether plaintiffs were entitled to the gross value of ⅛ of the gasoline, or its net value after costs of extraction had been paid.

"Plaintiff, in this case, having in his primary pleading alleged that lessee was entitled to and had bought all of the gas which came from the well and as a result of that purchase was liable to him for the full value of ⅛ of it, the district judge was right is holding that he could not add to the claim for that full value, another claim for two cents per 1,000 feet more, because the purchaser of the gas had extracted gasoline from it."

We respectfully suggest that the Court of Appeals is clearly in error.

The Court of Appeals differentiates the *Coyle* case from the case at bar, on the grounds that the percentage of gasoline was higher in the *Coyle* case. This seems entirely irrelevant to the legal principle. If the landowner is entitled to ⅛th of the gasoline and ⅛th of the dry gas, when the percentage of gasoline is high, why is he not equally entitled to it when the percentage is low? The dictum that lessor sells the gas to the lessee at the well seems also immaterial, and incorrect, because that is not

what the lease says. Lessor sells to lessee, not gas, but the right to go on the land and take and own all of the gas. The Court of Appeals is therefore in error on the very fundamentals of an oil and gas lease (Tr. 22).

The Court differentiates the *Wall* case on the same ground, that the percentage of gasoline is high, which is incorrect, because there is no showing of excessive gasoline in the *Wall* case, and the percentage of gasoline stated in the opinion is almost exactly the same as in the gas produced from petitioner's well.

The reference in the last paragraph, to the pleadings in the *Pardue* case, has no reference to the case here at bar, because our petition or complaint in this case recites all the facts regarding the gasoline and gas, and prays for market price of each separately (Tr. 15-16).

Hence it seems clear that the Court of Appeals has not followed the jurisprudence clearly expressed by the Supreme Court of Louisiana, that petitioner is entitled to ⅛th royalty on gasoline. This will be a big amount.

2. MARKET PRICE CONTEMPLATED BY THE LEASE WAS PRICE IN FIELD

In construing a contract of lease stipulating that the royalty shall be ⅛th of the market price of gas produced, the first question is, what market was contemplated by the parties. If the gas were sold at the well where produced, it might be held that the market price of such sales was what was contemplated. But no such sales were had in the case at bar. In the absence of such sales, it seems obvious that what the parties contemplated was the market

price of sales in the gas field where the gas field was produced.

In the case at bar, the Richland gas field is a definite, clearly defined tract of land, about 9 miles long by six miles wide, thickly studded with wells, with the points of sale of gas scattered thruout the field. Obviously there can be only one market price for gas in this little area, because the sales are scattered all over the area, and it would be no more possible to have two different market prices for gas in that field, than to have two different market prices for wheat in the City of Chicago.

The Supreme Court of Louisiana has expressly recognized this in two cases, when the Court had before it leases, with the same royalty clause on gas as in the lease now at bar.

In *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561, 563*, that Court said:

> "In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of the value of the gas sold off the premises, calculated at the 'market price' thereof. The price to be paid was left open or made to depend upon the 'market price' at the time the gas was produced . . . There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term 'market price' meant the price at the well, or the price the gas would bring in a market remote from the well. We think it reasonable to assume that *the parties intended that, if there was a market for gas in the field, the current market price there should be paid.*" (Italics ours).

In *Sartor v. United Carbon Co., 183 La. 287, 163 So. 103*, the lease involved was the same as in the case at bar, except it stipulated for market price "at the well", and that Court said:

> "This Court in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well, was synonymous with the market price at the field where the gas was produced."

Hence we respectfully submit that the opinion of the Court of Appeals seems erroneous in stating that we have not pointed out any good reason why that Court should "plump" with petitioner for a new measure, market price in the field, and the Court of Appeals has expressly failed to follow the jurisprudence of the Supreme Court of the State of Louisiana, in not holding that the market contemplated by the parties to this lease was the market in the field where the gas is produced.

3. DENIAL OF APPEAL

If the District Court had refused to grant petitioner any appeal from its judgment, that undoubtedly would be denial of due process of law, because Congress has seen fit to grant such appeal.

We respectfully suggest that the refusal of the Court of Appeals to consider and decide the issues laid before the Court by petitioner on the appeal, is even more a denial of due process of law and a departure from the customary judicial procedure. Petitioner spent much time and money perfecting appeal, and confidently relied on it to correct the errors of the trial court. It would be much more merciful to deny appeal altogether than to permit an

appeal where the appellate court does not carefully consider the issues laid before it.

That the Court of Appeals did fail to consider and decide the issues laid before them by petitioner as appellant, is apparent from what has been previously said. To make this clear, we annex to this brief, a copy of our original brief in the Court of Appeals. Our brief in that Court on rehearing is already in this record.

Our 1st and strongest claim was that the District Court erred in admitting in evidence 865 oil and gas leases in which the royalty was 3c instead of "market price". This was clearly error because these leases were not sales of gas, but were sales for a valuable consideration paid at the time, of the right to go on land and drill (Tr. 22), and usually no gas was ever produced. The Court of Appeals mentions this assignment of error, but does not consider or decide it.

Next we urged that no deductions should be made from the pipe line prices. The Court of Appeals does not notice this.

Next we objected to having the opinions of high ranking gas company officials, that the correct market price was 3c, hurled at the jury. The Court of Appeals does not notice this contention.

Next we objected to certain technicalities of evidence. The Court of Appeals did not notice this.

The opinion of the Court of Appeals does refer to other decisions by that Court. It specially refers to two decisions rendered the same day as the case at bar:

Union Producing Co. v. Pardue, 117 F. 2d. 225;
Union Producing Co. v. Driskell, 117 F. 2d. 229.

which, as we have shown, do not touch on the issues in this case, except gasoline, for the simple reason that in those cases the jury decided in favor of the landowner.

In two preceding cases, the Court of Appeals had considered these issues. In *Arkansas Nat. Gas Co. v. Sartor, 78 F. 2d 929*, the Court ruled that the written contracts of sale cannot be introduced in evidence, because they are sales of large quantities of gas and lessors would not have been able to sell large quantities. We have never understood this reason, as written contracts of sale seem the best evidence of the price.

In *Sartor v. United Gas P. S. Co., 84 F 2d 436, 438*, the Court of Appeals said:

> "While, then, we agree with the District Judge in the view he took in the Arkansas Natural Gas case and in this, that plaintiffs were entitled to receive for the gas the market price at the well, and not the market price in the field, we agree with plaintiffs that they were not bound, in determining that market price, or if there was no market price the fair value at the well, by what defendant chose to pay them and others, Wall vs. United Gas, 152 So. 561, but were entitled to inquire into what defendant sold gas for at the well, if it sold any there. If none was sold at the well, and if there was no actual market price established day by day in the field, they were entitled, in proving the value at the well, to prove what defendant got for it day by day in the field. In doing this they and the defendant were entitled to have taken into consideration under careful instructions to the jury,

all the elements which entered into the price in the field, so as to carefully limit the value or price to be paid plaintiffs so that part of the price the gas sold for in the field, which after proper deductions, represented the price at the well. On another trial the jury should therefore be carefully instructed, among other things that the prices the producer is obtaining for gas under his pipeline contracts are not true daily market prices. They are prices paid under long term contracts, entered into years before, and therefore having a bearing on the issue to be tried not as representing fixed daily market prices, but merely as aiding in arriving at a conclusion as to the fair value at the well, from day to day, of the gas taken from plaintiffs' well.

In determining market price or value a mere matter of opinion in a case like this, fixed and rigid rules do not govern. The object and purpose of the inquiry in this case is to determine, (1) if it can be done, the daily market price at the well, or at the nearest market, less costs of getting it there. (2) If there is no daily market price, the object is to determine what the gas is actually worth at the well. In determining this every factor throwing any light upon it may and should be considered. The factors of remoteness or of differences in circumstances attending the prices selected for comparison should be controlled by guiding, rather than by exclusionary ruling. These are the basic rights of the parties under the lease. Plaintiffs should have and defendant should pay them ⅛ of the gas taken the market value at the well, if there was one, the actual value there, if there was not. In determining this every factor properly bearing upon its establishment should be taken into consideration. Included in these are the fixed royalties obtaining in leases in the field, considered in the light of their respective dates, the

prices paid under the pipeline contracts, the conditions existing when they were made, and any changes of conditions. The end and aim in view being to ascertain upon a fair consideration of all relevant factors, the fair value at the well of the gas produced and sold by the defendant."

The requirement of the above decision, that any landowner seeking to recover the market price of gas must show daily market price, was so contrary to the possible proof, that in the case at bar we introduced new evidence, not before the Court of Appeals in the above decision but before that Court in this case, namely, the testimony of the President of the American Gas Association, Mr. N. C. McGowen (Tr. 60-62).

He testifies that the market for natural gas must be pipe lines, because gas cannot be transported from the field where produced to the place where used, by railroad cars or trucks, as in the case of oil, but can be carried only in pipe lines. Pipe lines are expensive. Before a pipe line is built, the builders must have contracts for a reliable supply of gas continuously for a sufficiently long period to amortize the cost of the pipe line.

Hence Mr. McGowen testifies the market for gas cannot be a daily market, but is a long-term market, that is, the sales are at prices fixed by contract in advance. He testifies that the parties to this lease must have contemplated such a market when they made this lease stipulating that royalty should be "market price."

Altho this highest expert thus testified that the Court of Appeals in the foregoing decision had set an impossible standard of proof, which completely misunderstood the nature of gas and its markets, and altho we strongly called

this to the attention of the Court, yet the Court completely ignores and does not even mention this testimony, or modify its ruling.

4. GENERAL IMPORTANCE OF THIS CASE

The general importance of the issues here presented is shown by the fact that all or part of these issues have been before the Courts recently in the following cases:

U. S. 5th Circuit Court of Appeals:

Arkansas Nat. Gas. Co. v. Sartor, 78 F. 2d. 924;
Roberts v. United Carbon Co., 78 F. 2d. 39;
United Gas Co. v. Pardue, 78 F. 2d. 929;
Brown v. United Gas P. S. Co., 96 F. 2d. 264;
Thomason v. United Gas P. S. Co., 98 F. 2d. 526;
Sartor v. United Gas P. S. Co., 84 F. 2d. 436;
Arkansas Nat. Gas Co. v. Sartor, 98 F. 2d. 527;
Union Producing Co. v. Driskell, 117 F. 2d. 229;
Union Producing Co. v. Pardue, 117 F. 2d. 225.

Supreme Court of Louisiana:

Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561;
Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737;
Sartor v. United Gas P. S. Co., 186 La. 555, 173 So. 103;
Sartor v. United Carbon Co., 183 La. 287, 163 So. 103;
State ex. rel. Boykin v. Hope Producing Co., 167 So. 506.

In each of these cases, and in countless other cases, the situation is that a landowner, usually a small farmer, entirely unacquainted with the gas business, is endeavor-

ing to obtain from a large oil or gas company, his rightful share of the price of natural gas, including increases.

In each case, the oil or gas company was settling with the landowners, who knew nothing about the price of gas, by sending them statements showing the market price of gas to be far less than the price at which gas was being actually sold in the fields where produced, sometimes only little more than half the actual sales. These sales had been kept hidden from the landowners.

When the price being received by the gas companies was made generally known, as being far more than the landowners were receiving in their settlements, the able and resourceful attorneys for the gas companies adopted the well-known principle of practical law: "When the facts and the law are against you, confuse the issues".

In this case, and in other cases, the attorneys for the gas companies have done a masterly job of confusing the issues. Some of their methods of confusing the issues are hereinabove stated. The game is to make the evidence required for proving "market price" so complicated, uncertain and technical that no land-owner can make the required proof, and the gas companies can pay them anything they please.

We ask this Court to note the requirements for proof of market price called for in the opinion of the Court of Appeals in *Sartor v. United Gas P. S. Co., 84 Fed. 2d 436, 438*, just above quoted in this brief. This is the final jurisprudence unless your Honors intervene, because the Court of Appeals has ignored our requests in this case for a modification.

In this opinion, the Court says landowners must prove the "value" of the gas. The lease contract says that landowners shall receive the "price" of the gas. Price is a fixed amount, easily proven, by simply showing the sales. Value is a hazy, inexact concept almost impossible to prove. It does not seem right that landowners should be compelled to prove the value of gas, when their contract calls for its price.

Next the Court says the landowner must show the daily market value. We have shown in the case at bar that there is no such daily market price or value, from the nature of the gas. So landowners are required to prove an impossibility.

Then the Court says landowners must prove every factor entering into the value. This makes the whole proof so hazy and uncertain that no landowner can hope to compete with an expert oil and gas company in the courts with such proof required.

If your Honors will take up this case, we believe a rule will be laid down that the market price of natural gas is to be proved by taking a fair average of the sales in the field where it is produced. If this rule is laid down, the thousands and hundreds of thousands of landowners who hold leases reading substantially like the lease at bar, will be able to secure their rights and the increased royalty due them as the price of natural gas advances, simply and easily, because the price at which gas is sold can always be surely proven.

If your Honors do not take up this case, the above quoted decision of the Court of Appeals becomes the final jurisprudence, and it will be practically impossible for a

landowner to obtain his rightful share of the gas produced, in contest with the big, powerful and highly expert and experienced gas companies.

Respectfully submitted,

G. P. BULLIS,
Attorney for Petitioner.